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IN THE

Supreme Court of the United States

October Term, 1962

No. 289

EDWARD MISHKIN,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Petitioner, Edward Mishkin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on May 20, 1963, rehearing denied June 19, 1963.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in the Appendix hereto, *infra*, is not yet reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered May 20, 1964 (Appendix hereto, *infra*). A petition for rehearing, filed May 31, 1963,

was denied by the Court of Appeals on June 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Was petitioner's conviction of conspiracy to import obscene matters obtained without due process of law, and without fair trial, in that the "conspiracy" device was here stretched beyond recognition to enable the prosecution to bootstrap a "case" on the basis of cumulative inadmissible hearsay proofs?

2. Was the conviction obtained in violation of due process of law and of petitioner's rights of free expression under the First Amendment in that there was no proof of petitioner's scienter of the obscene character of the books or magazines involved in this case?

3. Was petitioner denied a fair trial by the Trial Court's abuse of discretion in gratuitously submitting for examination by the Jury the books or magazines involved notwithstanding the express concession of the defense that the matter was obscene in character?

Constitutional and Statutory Provisions Involved

The case involves the First Amendment (freedom of the press), and the Fifth Amendment (due process of law), of the Federal Constitution. It also involves 18 U.S.C. 1462, an "obscenity" statute; and 18 U.S.C. 371, the general conspiracy statute. These provisions are printed in the Appendix hereto, *infra*.

STATEMENT OF THE CASE

1. Introductory

By the judgment of the United States Court of Appeals for the Second Circuit which is here sought to be reviewed, the latter Court affirmed a final judgment (112a)* of the United States District Court for the Southern District of New York (Cooper, D.J.), entered November 20, 1962, after a jury trial, convicting the petitioner Mishkin under one count of conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 1462 (importation of obscene matters), and sentencing the petitioner to imprisonment for five years, the last 4 and ½ years of which were to be suspended and the petitioner placed on probation for said 4 and ½ years (112a).

Petitioner has been and he presently remains free on bail.

Petitioner Mishkin was the only defendant tried in the instant trial, although the indictment, as noted, included conspiracy charges. In addition to the conspiracy-importation count under which Mishkin was convicted (Count Two—18 U.S.C. 371), the indictment included one substantive-importation count (Count One—18 U.S.C. 1462 and 2) which was companion with said conspiracy-importation Count; and, based on the same alleged transaction, and the same obscene matter involved in the first two Counts, the indictment included another brace of substantive and conspiracy charges (Counts Three (18 U.S.C. 1465 and 2) and Four (18 U.S.C. 371), grounded on the transportation-in-foreign-commerce-for-sale aspects (as distinct from the importation aspect).

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* "... a" refers to the "Appellant's Appendix" printed for the appeal in the Court below. Nine extra copies of this Appendix are filed herewith.

The trial court dismissed the "transportation" counts, Counts Three and Four (76a). The jury acquitted appellant Mishkin on Count One (100a), the substantive count as to importation, while convicting him on the conspiracy-importation count (Count Two) (100a) as aforesaid.

The other defendants named in this indictment (all defendants were named in all four counts), none of whom were tried in this trial as previously indicated, were John F. Stamp, a British seaman, who had pleaded guilty (3a); William G. Pratt, who apparently absented himself from the trial after being arraigned and pleading not guilty (3a, 13a-14a); and John Monk, John Doe ("Dennis"), and Richard Roe ("Roy"), seemingly British residents, who were apparently not apprehended for trial (2a).

The defendant Stamp received, on his guilty plea, a suspended sentence on all counts, and he was placed on probation for one day (106a). Stamp testified for the Government in the instant trial (*infra*).

2. The Framework of the Issues of Admissibility And of the Use of the "Conspiracy" Device in This Case.

As the above heading suggests, the way in which the Government saw fit to put in its proofs in this case (with the approval of both of the Courts below) is believed by petitioner to present exceptionally disturbing problems of admissibility of evidence in Federal "conspiracy" prosecutions, calling for scrutiny and correction by this Court. We maintain that what happened in this trial was nothing more nor less than that literally all of the assertedly inculpating evidence against petitioner Mishkin was inadmis-

sible, and that the Government was able to "get away with" this thanks to its adroit use of the multiple-count indictment device, the Trial Court's apparent lack of comprehension of the rules of evidence applicable in federal conspiracy prosecutions, and the seeming disinclination of the Court below to disturb the conviction notwithstanding the really grotesque departures from traditional concepts of fair trial which we shall demonstrate in this petition.

The following is a summary of the pertinent testimony and of the pertinent trial and appellate proceedings:

Co-defendant John F. Stamp, testifying for the Government, stated that he was a seaman aboard the Queen Mary (18a) that in August, 1962, he was asked by a fellow seaman, defendant John Monk, if he would take a package to New York on board the Queen Mary from Southampton on his next trip (20a); that he, Stamp, agreed to do so (20a); that on August 14, 1962, Monk took Stamp to a book store in Southampton, England, where Stamp met two men introduced to him as Dennis and Roy (20a); that Dennis asked Stamp if he would take the package to New York, Stamp said yes, and then Dennis said that they would talk no more about it at that time but that Monk would come down on the morning of Stamp's sailing and would then give him the package and instructions (21a); that a person named Eddie (no last name) was spoken of on this occasion as the person to whom the package was to be delivered in New York (22a); that on August 16, 1962, Monk came to the Queen Mary in Southhampton with a package, he said to Stamp that this was the package to be delivered to New York, he put the package unopened into Stamp's ship locker, and he gave Stamp instructions to take the package into a certain subway station in New York and put it in a locker there, then to take the key to

the locker to a certain specifically described book store on 42nd Street where he was to ask for a person named Eddie, to whom Stamp was to give the key and tell him it was "a present from the boys in England and John would see him next trip" (22a-23a); that when the Queen Mary arrived in New York on August 21, 1962, Stamp opened the package, then seeing its contents for the first time, and he took out twelve copies of a book or magazine entitled "Thrashed in Many Ways" (containing pictures) (23a, 32a); that he put the books under his coat and left the ship (23a), and that as he left the pier entrance he was apprehended by customs port investigators who found the magazines on his person (23a, 26a).

The defense objected on grounds of hearsay to the admissibility of all of Stamp's above testimony as to conversations with defendants Monk, "Roy" and "Dennis" in the absence of defendant Mishkin (19a-20a). The testimony was admitted "subject to connection" on the theory of co-conspirators' declarations in furtherance of the conspiracy (*ibid*). As will appear, the only "independent" evidence which purported *aliunde* to link Mishkin to the conspiracy —said evidence was received at a stage of the trial subsequent to Stamp's above-described testimony—was in itself inadmissible on grounds noted *infra*.

Stamp's above-described testimony carried the story, as seen, down to the time of his apprehension by the Customs investigators at the pier in New York City on August 21, 1962. This apprehension was definitely and expressly an *arrest*, according to the Government's witnesses, the arrest being made then and there immediately upon the finding of the books or magazines on Stamp's person and

before Stamp had performed any other relevant acts or made any other relevant declarations beyond those above described (26a, 40a-41a, 51a).

As soon as the Government's proofs at the trial had reached the point just noted, i.e., Stamp's apprehension and arrest, the defense immediately requested the Trial Court to bar any further testimony by Stamp as to events *post* his arrest which could be used to try to inculpate defendant Mishkin (24a-25a)—indeed Mishkin being the only defendant on trial and Stamp having pleaded guilty, any further testimony by Stamp as to events *post* his arrest could affect no one but Mishkin.

In ruling on this defense request (24a-25a), the only concessions which the Trial Court made to the defense objection against *any* testimony from Stamp as to the post-arrest events were (1) that the jury should not be told in words that there was an "agreement" or "cooperation" between Stamp and the Customs officers, and (2) that Stamp should not testify at all as to statements but only as to acts. The illusoriness of these concessions, for all practical purposes, speedily became apparent as Stamp continued his direct testimony and, under the prosecutor's and the Court's guidance, played out the mummery (imperfectly at that—see below) of referring only to "acts" rather than "statements"; the following excerpts show that the Government succeeded, over repeated defense objection, in getting across to the Jury with excellent clarity, *per* co-conspirator Stamp's own testimony, that after his arrest he cooperated with the Government pursuant to an obviously express and detailed agreement and plan to inculpate defendant Mishkin in the "conspiracy" which had

already been thoroughly destroyed by Stamp's arrest; note in the following excerpts how Stamp was permitted to tell the Jury of the hearsay "instructions" after his arrest (25a-30a):

"*By Mr. Shea*:

Q. At this point, the questions I ask you, I would like you to tell me what you did and what happened and not what you said or what anyone else said to you. Try to keep that in mind.

* * * * *

Q. That night, what did you do and what did the Customs agents do? A. I went through the same instructions that were given to me in England.

Mr. Edelbaum: I move to strike it out.

Q. Don't say anything about instructions; just tell me what you actually did and what the Customs men actually did that night? A. I went to the subway station on 42nd Street, deposited the books in a locker, and took the key across to the store.

Q. Were you alone? A. No, I was followed closely by the Customs agents.

Mr. Edelbaum: I have a continuing objection to all of this testimony outside of the presence of the defendant, and I assume it is being taken subject to connection.

The Court: Yes.

By Mr. Shea:

Q. What did you do after you placed the books in the locker? A. I walked across 42nd Street to the bookstore.

Q. Tell us how you located the store? A. I located it by the instructions given me, which were the first

bookstore on the right between Eight Avenue and Broadway, going up towards Broadway.

Q. Did you actually deliver the key to to the locker at that point? A. No, I did not.

* * * * * *

Q. Did you actually deliver the key to the locker at that point? A. No, I did not.

* * * * * *

Q. I will now bring you to the next morning, the morning of the 22nd. I direct your attention to that day, and, remember, I don't want you to tell us any conversations; just tell us what you did that morning and what the Customs agents did. A. I went along to the subway station on 42nd Street about 11 a.m.

Q. Were you alone? A. No, with the Customs agents. I deposited the books in a locker, T184.

* * * * * *

Q. With that key in your possession, tell us what you did. A. I walked across to the store on 42nd Street. I was closely followed by a Customs agent and a Customs agent preceded me into the shop.

I walked into the shop and asked the clerk in the shop for Eddie. He shouted down the back of the shop two or three times the name Eddie, and a gentleman came up.

Q. Do you see that man who came to you in response to the name Eddie in this courtroom? A. Yes, the gentleman in the gray suit.

Mr. Edelbaum: Indicating the defendant.

* * * * * *

By Mr. Shea:

Q. Now, will you tell us what you said to him and what he said to you? A. I said to him, "I have a key for you from the boys in England," and he said,

"Okay" or "All right," I can't be sure of the exact words, but it was in the affirmative.

* * * * *

The Witness: I gave him the key. I said "John Monk will see you the next trip."

He said, "Okay" or "All right," something like that. I can't remember the exact words.

I then walked out of the store. All this time I was being watched by the Customs agents."

The Government also called to the stand Customs officers who testified in detail to Stamp's post-arrest acts along the same lines as indicated in Stamp's own testimony just quoted (40a-45a, 50a-52a); indeed these officers, like Stamp, kept slipping into references to *statements* by Stamp and his "agreement" to cooperate after his arrest—slippages which were inevitable under the artificial and cumbersome rulings of the Court above noted whereby the Government was not to be permitted to tell the Jury of any post-arrest *statement* or "agreement" by Stamp but would be permitted to tell the Jury of his post-arrest "acts".

Examples of such slippages by the Government agents were the testimony of agent Colucci who, when being asked about what was done with Stamp directly after the latter's arrest, stated that he was taken to a place for further interrogation and that then "he [Stamp] decided"—at which point, upon defense objection the Court stopped the witness —and then the witness again said "We interrogated the man further", to which the Court asked "After that?", to which the witness started to say "He agreed", the Court again stopping the witness who nevertheless went on and said "He talked to us" (41a-42a). Still more prejudicial was the testimony of agent Arthold, who said "We talked

to Mr. Stamp and he offered to cooperate with us", at which the Court interposed "Don't tell us what he said" (51a.) Aside from these express slippages, see the testimony at 40a-45a, 50a-52a, *passim*, in which the Customs officers describe in detail the post-arrest acts of Stamp, all done in conjunction with those officers, i.e., his carrying out under Government surveillance and supervision the "instructions" he had allegedly received from the original co-conspirators in England.

The foregoing carries the story down to the time when Stamp delivered the subway locker key to defendant Mishkin in the bookstore on 42nd Street, all done under the surveillance of the customs officers who were there by prearrangement made with Stamp after his arrest. It is next to be noted that at that juncture the chain of the investigative activity in regard to Mishkin himself was broken, i.e., the Government did not put any surveillance on Mishkin after he received the locker key from Stamp, and it is undisputed that the Government did not offer any direct proof of what Mishkin did with the subway locker key given him by Stamp or of what happened to that key between the time Mishkin received it and its subsequent reappearance as is about to be described (45a-46a, 48a, 65a). Instead, the customs officers shifted their sole and entire investigative activity to the scene of the subway locker, to await the quarry (whoever it might be) who should come with the key to remove the books from the locker. This quarry turned out to be defendant William G. Pratt, who arrived at the locker later on the day when Stamp had given Mishkin the key, took out the books, walked away with them—all under government surveillance—and was arrested shortly thereafter with the books in his possession

(46a-50a, 52a-53a, 55a). (Pratt, it will be recalled, absented himself from the trial after having pleaded not guilty.)

Further as regards Pratt, the Customs officers' search of his person after his arrest turned up two business cards on the backs of which appeared, in unidentified handwriting, respectively, the unlisted residence telephone numbers of the petitioner Edward Mishkin at his home in Yonkers, and the telephone number of the bookstore where Mishkin had received the subway locker key from Stamp (53a-57a). The defense unavailingly objected to the admission in evidence of these telephone numbers on the backs of the business cards, and moved to set aside the verdict as based on their erroneous admission, on the grounds that they were seized from Pratt after his arrest and out of the presence of the defendant Mishkin, and were not connected with Mishkin by having been shown in any way to have come from him or as being in his handwriting, etc. (54a, 61a-62a, 65a).

• • • • •

The evidence above described, together with the twelve books brought in by Stamp and later seized from Pratt, constituted the Government's case against Mishkin.

As to those twelve books, the defense conceded their pornographic character and urged the Court that by virtue of this concession it was unnecessary and would be prejudicial to submit the books for examination by the Jury lest the case against the defendant be inflamed (14a, 58a-60a). The Court ruled that the books should be submitted to the Jury (63a). It charged the Jury that the submission of the books for their examination was not for the purpose of determining their pornographic character ("You have been relieved of that obligation"), but was being done because "It is a

piece of evidence in the case, and it must be considered along with all the other evidence in the case" (77a-78a).

The defense rested without introducing evidence.

* * * * *

The Court of Appeals, in affirming the convictions, held that the principles adduced by the defense against the admission of Stamp's testimony regarding events following his arrest "are wholly inapplicable", because "Stamp's testimony as to the period after his arrest related solely to his own acts and to one conversation with the defendant"; to which the Court appended a footnote saying, "The only exception, relating to Stamp's agreement to cooperate with the authorities, was brought out by appellant on cross-examination." The Court then concluded its reasoning on this point by saying "This testimony, which was subject to cross-examination, was not hearsay, and was clearly admissible", citing *United States v. Cohen*, 197 F. 2d 26, 29 (C.A. 3 1952).

Having determined that Stamp's testimony regarding the events following his arrest was admissible, the Court of Appeals went on to hold also that since this testimony sufficiently connected petitioner Mishkin to the conspiracy, Stamp's testimony as to the arrangements made in England was also admissible as relating to earlier declarations of co-conspirators made in furtherance of the conspiracy.

The Court of Appeals also held that the telephone number notations found on Pratt's person after his arrest were admissible and not excludible as hearsay because they were admitted not to prove petitioner Mishkin's telephone number and connection with the bookstore, but as part of the

proof that Pratt had received the key to the subway locker from Mishkin.

The Court of Appeals further ruled that, even though "Mishkin may not have known the exact title and contents of the books", his scienter of the obscene character of the books was sufficiently proved by "the clandestine manner in which the delivery to Mishkin was to be effected, and from Mishkin's apparent familiarity with the scheme"—and from "his knowledge of its general purpose".

Finally, the Court of Appeals held, on the authority of *Parr* v. *United States*, 255 F. 2d 86, 88 (C.A. 5 1958), certiorari denied 358 U. S. 824, that "while there is some merit also in the contrary view", the admission of the books notwithstanding the defense concession of their obscenity and the defense objection that it was therefore unnecessary and prejudicial to submit the books to the Jury, was proper, the question of admissibility being addressed to the trial court's discretion and "we cannot say that that discretion was abused."

Reasons for Granting the Writ

The Court below has decided important questions of federal law which have not been, but should be, settled by this Court; it has decided federal questions in a way in conflict with applicable decisions of this Court; and it has sanctioned rulings by the trial court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, a power to which this Court has given special emphasis in regard to the administration of federal criminal justice.

1. The Court below made no mention at all in its opinion (except to say that "Appellant's remaining points are without merit") of the distinct point of argument in our brief in that Court (Point II) where we dealt not only with the question of the admissibility of post-conspiracy hearsay—of which the Court below did speak in its opinion—but also with what we thought was the compelling question of whether, as a matter of fair trial and due process, the Government should be permitted to "make a case" of "conspiracy" by piling improper segments of proof one upon another in a situation where, at most, the Government had either a case of substantive crime only, or a case of conspiracy which had fallen short of reaching the petitioner Mishkin owing to the arrest of Stamp. This feature of the case (see further details *infra*), we submit, calls compellingly for review by this Court, bearing in mind especially that Mishkin was specifically acquitted on the substantive count (cf. *Manley* v. *United States*, 283 F. 2d 211, 222 (C.A. 6 1956)*); and bearing in mind also that the prosecutive device of "conspiracy" is already amorphous enough, and contains within itself possibilities of unfairness enough, without additionally aggrandizing its potencies (and its potentialities for injustice) by loosening so egregiously as we feel has here occurred the sheer requirements of proper trial proof and admissibility of evidence.

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* In Manley, *supra*, the Court, while acknowledging that inconsistent verdicts on charges of substantive crime and conspiracy, standing alone, would not justify reversal, went on to say:

> "* * * but, when an obviously inconsistent verdict as to different Counts * * * is returned by the Jury, both the Trial Court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

We think that what has happened in this case—the artificialization of an ostensible "conspiracy" case by bootstrapping a series of probative insufficiencies—makes it timely to remember the words of this Court in *Re Bonner*, 151 U. S. 242; 259 (1894), that "The Laws of our country take care, or should take care, that not the weight of a judge's finger shall fall upon anyone except as specifically authorized."

Let us examine a little more closely the bootstrapping contrivances by which this "conspiracy" case was mounted. It is not difficult to reconstruct the tactical plan of this prosecution and the problems which the prosecution attorneys faced and tried to overcome.

At the outset, in its efforts to build this case, the Government had the custody of the English seaman John F. Stamp, who had been arrested at the pier in New York on August 21, 1962 with certain books or magazines in his possession; and, apparently, within a few hours after Stamp's arrest, the Government had Stamp's story about his alleged confederates in England* and the alleged plan to deliver the books to someone named "Eddie" at a designated bookstore in New York City, the delivery to be made through the device of giving "Eddie" a key to a subway locker in which Stamp was to cache the books. Stamp, as seen, did not know who "Eddie" was and had never met him. The only information Stamp had about "Eddie" consisted of instructions on how to locate "Eddie," and instructions on a procedure for turning over to "Eddie" the subway locker key.

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* None of whom were available for this trial—so that the Government presumably never became able to utilize those persons in building this case.

With Stamp in custody, and with this story of Stamp's known to it, the Government then and there had a case for prosecution—against Stamp and his alleged confederates in England.

But it did not have a case against "Eddie," because neither Stamp nor the Government knew who "Eddie" was; and because of another reason presenting even greater difficulty. This other reason was that all of the Government's information about "Eddie" had come from the post-arrest statements of Stamp, which meant (1) that such statements would be inadmissible as hearsay in any prosecution, whether on substantive or conspiracy charges against "Eddie" even if his identity were learned; and (2) that any further acts by Stamp to effectuate the original alleged conspiracy by delivering the subway locker key to "Eddie" could not legally form the basis of a prosecution of "Eddie" on the charge of participation in such alleged original conspiracy because that conspiracy had terminated with the arrest of Stamp, who moreover was the sole and indispensible "conspirator" for effectuating any consummation of such original alleged conspiracy with "Eddie".

In this posture of the investigative status of the matter as of the time of the arrest of Stamp, and as of the time of his statements to the Customs officers on August 21, 1962, the Government decided to cause the carrying out of the original alleged conspiratorial plan which necessarily meant that Stamp would be acting as an agent of the Government, not as an agent of the alleged original "conspiracy".

If the testimony of the Government witnesses at this trial is believed, i.e., the testimony that Stamp under surveillance of the Customs officers did deliver the subway locker key to Mishkin, etc., what, if any, would be the federal crime with which Mishkin is chargeable? And, more important, what would be the proper bounds of the admissible proofs in a prosecution of Mishkin for such supposed federal crime? Such federal crime, if any, would of necessity be substantive in nature, not conspiracy; it would have to be a charge of some form of substantive offense of receiving obscene matter (and, of course, such receiving would have to be within the federal statutory jurisdiction of interstate or foreign commerce).

Without going into tedious detail, we think it is readily apparent that, if the Government were limited to the legally admissible proofs in such a hypothesized prosecution of Mishkin, it could not make out a jury case. One sufficient reason why this is so is that, in such a hypothesized prosecution, there would plainly be insufficient proof of the defendant's scienter of foreign importation or other out-of-state source of the obscene matter (or, more accurately, of the subway locker key which was supposed to lead to the obscene matter). Another sufficient reason is that there would be no proof at all of Mishkin's scienter of the contents of the obscene matter. A final sufficient reason for not further pursuing this hypothetical theme is that the jury in this very case acquitted Mishkin on the very type of substantive count of which we are speaking, and this acquittal occurred upon a *probatum* which included all of that testimony which we contend was inadmissible and which would have had to be excluded from that hypothetically valid prosecution above suggested.

The foregoing analysis helps to reveal, we submit, the fatal flaws of pleading and proof in the instant prosecution. As to the pleading aspect, the Government's use of the multiple-count indictment herein—all the counts being based upon a single alleged transaction—was obviously designed, *via* the conspiracy counts, to facilitate the introduction of hearsay evidence that would be inadmissible under the substantive counts. The inclusion of the Third and Fourth Counts (18 U.S.C. 1465), addressed to the transportation-for-sale feature, was obviously done with a view to playing upon the fact that the defendant Mishkin was located in a bookstore; it will be recalled that these latter two counts were dismissed by the trial court.

At this late date in the development of the federal case law on the proper limits of "hearsay" proof of acts or declarations by co-conspirators in conspiracy cases, it is surprising to see a trial record which so strikingly offends against what we had thought were veritable axioms of that branch of the law. Even if it be conceded (which we do not do) that under the particular charges of the instant indictment Stamp's testimony concerning his alleged acts and declarations done in the actual presence of the defendant Mishkin were admissible as being relevant and material to those particular charges,* it seems indisputable that not one single other word of Stamp's (or the Customs officers') testimony as to anything he said or did after his arrest on

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* We refer to the alleged scene in the bookstore on 42nd Street where Stamp is supposed to have delivered the subway locker key to Mishkin with a statement that it was a present from the boys in England, etc.

August 21, 1962 was admissible.* In the familiar language of *Fiswick* v. *United States*, 329 U. S. 211, 217 (1946), " * * * concession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. * * * " See also, *Sandez* v. *United States*, 239 F. 2d 239, 243 (C.A. 9 1956), reh. den. 245 F. 2d 712, where, although the conspiracy conviction was affirmed on grounds not here pertinent, the Court said: " * * * We think that the moment of any conspirator's arrest is decisive as to him, even if it should be maintained that the arrest of the first conspirator is not conclusive as to all. At that moment, the conspiracy has been thwarted, and presumably no other overt act contributing to the conspiracy can possibly take place at least so far as the arrested conspirator is concerned. * * * " This language from the *Sandez* case is especially appropriate here because the conspiracy count here involved alleges as one of the overt acts the alleged conversation on August 22, 1962 between Stamp and the defendant Mishkin in the bookstore on 42nd Street (10a), which alleged conversation was, of course, subsequent to Stamp's arrest on the preceding day. See also, *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (C.A. 2 1957), and authorities there cited; *Cleaver* v. *United States*, 238 F. 2d 766 (C.A. 10 1957); *United States* v. *Lee*, 276 F. 2d 605 (C.A. 2, 1960); *Canida* v. *United States*, 250 F. 2d 822 (C.A. 5 1958).

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* We discuss separately, *infra*, the question of the admissibility of Stamp's testimony concerning the alleged conspiratorial arrangements in England prior to his arrest, all of which took place in the absence of Mishkin.

We think it was demonstrated in our Statement, *supra*, that in all practical effect, the Jury were apprised, thanks to the testimony of Stamp and the Customs officers regarding the former's post-arrest activities, and thanks also to the testimony adduced by the Government that Stamp had received a one-day suspended sentence in this same case, that Stamp had entered into an express agreement with the Government to cooperate and, therefore, that he had made a confession in which he inculpated his alleged co-conspirators including "Eddie". All of this occurred over the objection of the defense that all or any testimony by or concerning Stamp in regard to his post-arrest acts or declarations was inadmissible.* The Trial Court's concessions to the defense objection against any testimony as to the post arrest events—i.e., the concessions that the Jury should not be told in words that there was "an agreement" or "cooperation" between Stamp and the Customs Officers, and that Stamp should not testify at all as to statements but only as to acts—were utterly illusory. For all practical purposes, as speedily became apparent in Stamp's next ensuing direct testimony, the Government succeeded in getting across to the Jury quite clearly that after Stamp's arrest he cooperated with the Government pursuant to an obviously express and detailed agreement and plan to inculpate appellant Mishkin in the "conspiracy" which had already been destroyed by Stamp's arrest. This entire theme, that Stamp was expressly cooperating with the Government officials after his arrest, was effectively conveyed to the Jury in Stamp's direct examination notwith-

* We find no indication in any of the reported decisions on this subject that a distinction is to be drawn between "acts" and "declarations" of a co-conspirator made after his arrest. Nor does any such distinction seem supportable in principle.

standing the procedural masquerade which was played out *via* "striking" of testimony, sustaining of defense objections, etc. Thus, as shown by the testimony earlier quoted, the Jury heard Stamp say (on direct examination) that he went through, with the Customs Agents, the instructions that had been given to him in England; that what he and the Customs Agents did was that he went a first time to the subway locker and to the book store with the key while he "was followed closely by the Customs Agents"; that, again, what he and the Customs Agents did was that he went a second time to the subway locker and in the presence of the Customs Agents deposited the books in a locker; that when he went again to the store on 42nd Street he "was closely followed by a Customs Agent" etc., and that "All this time I was being watched by the Customs Agents".

The effect of Stamp's direct testimony was to tell the Jury, just as clearly as though he had been allowed to do so in express words, that after his arrest he cooperated with the Government Agents to carry out the alleged conspiratorial instructions.

If we are correct that such was the realistic practical effect of Stamp's direct testimony—all of which, it will be remembered, was received over strenuous objections of the defense both before Stamp took the stand and repeatedly throughout his direct testimony—then was the Court below not incorrect in its opinion in ignoring this circumstance, which we respectfully deem to be factually and legally dispositive; and was that Court not further in error, derivatively from the foregoing, in emphasizing the fact that the defense brought out during Stamp's cross-examination facts as to Stamp's agreement to cooperate with the au-

thorities? Not only was that cross-examination not the originating source of the Jury's apprisal as to Stamp's cooperation with the authorities (the origination, again, having been the clumsy masquerade phase above mentioned), but that cross-examination was vitally necessary in the interests of the defendant precisely because the Prosecution and the Court had already "let the cat out of the bag"—indeed defense counsel would have been seriously derelict if he had not cross-examined Stamp on this phase after the story of Stamp's cooperation with the Government had for all practical purposes already been so plainly broadcast to the Jury.

Moreover, when the trial court, over defense objections as aforesaid, admitted into evidence the testimony as to Stamp's post-arrest activities (which, again, included by unmistakable implication his post-arrest "declarations"), the fat was in the fire as regards the entire subsequent development of the Government's case and the defendant's chance to protect himself against being convicted by a web of inadmissible proofs. For, without the antecedent admission in evidence of Stamp's inadmissible testimony, the Government would naturally have had no foundation for spreading before the Jury the proofs as to the alleged subsequent happenings involving the final disposition of the subway locker key in the hands of defendant Pratt. Throughout this case the pattern and development of the Government's proofs evince a piling of one probative illegality upon another.

In our petition for rehearing we unavailingly requested the Court below to reconsider the authoritativeness, and the applicability herein, of the case of *United States* v. *Cohen*, 197 F. 2d 26, 29 (C.A. 3 1952), which that Court cited in its

opinion as supporting its conclusion that the Stamp testimony was admissible. In the first place, as to the *applicability* of the *Cohen* case, so far as appears from the *Cohen* opinion the post-arrest testimony of the conspirator Herndon related solely to his post-arrest contacts with other conspirators, i.e., there is no indication in the *Cohen* case that, as was true here, the arrested conspirator (here Stamp) testified to post-arrest acts with any persons other than his alleged fellow conspirators—Stamp, in our case, having testified (in practical effect) as to his detailed dealings with the Customs Agents under a manifest agreement to cooperate with them (amounting incidentally, to hearsay testimony of a prior confession of guilt by the alleged co-conspirator Stamp). *Second*, the only authority cited in the *Cohen* case for its proposition that "the law is clear that the withdrawal of a single conspirator, by arrest or otherwise, does not terminate the conspiracy or change the status of the remaining members" is *Marino* v. *United States*, 91 F. 2d 691 (C.C.A. 9 1937), certiorari denied *sub nom Gullo* v. *United States*, 302 U. S. 764—and the proposition of the *Cohen* case just quoted is the only proposition of law adduced by the Court there to support its ruling that Herndon's post-arrest testimony was admissible. The facts in *Marino*, however, are not even remotely analagous to those in *Cohen*, and *a fortiori* they are not analogous to our facts. All that was involved in *Marino*, as regards admissibility of testimony relating to arrested conspirators, was that evidence merely that such arrest had occurred was admitted (see 91 F. 2d at p. 698). We respectfully urge that the *Cohen* case, with its distinguishable facts and its dubious support in the *Marino* case which *Cohen* cites, should not be deemed to be dispositive of or even as being indicatively

authoritative for our situation with its peculiar facts as hereinabove described.

It was also error to receive in evidence, over defense objections, Stamp's testimony as to the alleged happenings in England, all of which undisputedly occurred in the absence of the defendant Mishkin. This testimony was admitted subject to connection. But Mishkin was never "connected up" with the alleged conspiracy by any independent evidence which was admissible, or, if admissible, which was sufficient. Here again, it is necessary to take into account the process to which we above referred whereby the Government kept piling improper proofs one upon another. The proof that the alleged conspirator "Eddie" who is supposed to have been mentioned in the conversations in England was the defendant Mishkin was absolutely dependent upon the entire post-arrest activity of Stamp in conjunction with the Customs officers. But, as above urged, the proof as to this entire phase was in itself inadmissible as post-arrest hearsay involving acts which were not in furtherance of the "conspiracy." The theory of the Government's proofs, then, in regard to this question of evidence *aliunde* to prove Mishkin's participation in the conspiracy (in order that Stamp's testimony concerning the alleged conversations in England should become admissible), is a perfect exercise in circular reasoning. How can proposition "A" (that Stamp's testimony about the conversations in England is admissible because Mishkin's participation is proved by independent evidence) be sustained on the basis of proposition "B", when the latter proposition (that Mishkin's conspiratorial participation was proved by acts of Stamp after the latter's arrest) is itself founded on inadmissible testimony?

On the question as to the admissibility of the business cards found in the possession of the defendant Pratt after his arrest (the cards on the back of which appeared the handwritten telephone numbers which were connected with the defendant Mishkin), we submit as follows:

First, this segment of the Government's proof could never have been reached for legal presentation to the jury but for the antecedent errors, discussed above, which permitted the Government to "prove out" its conspiracy charges, step-by-step, on the indispensable (and inadmissible) basis of Stamp's testimony concerning the alleged conspiratorial conversations in England and his acts subsequent to his own arrest. *Second*, since the business cards in question were seized from Pratt after the latter's own arrest, we respectfully submit that those cards fall under the same ban as do the acts and declarations of a co-conspirator made after his arrest. While we have found no case precisely in point on this issue, we submit that the cases of *United States* v. *Dellaro*, 99 F. 2d 781, 783 (C.C.A. 2 1938), and *Brown* v. *United States*, 298 Fed. 428, 430 (C.C.A. 2 1924) support our position in this respect. In *Dellaro* the Court held that it was reversible error to admit in evidence, on the issue of whether a certain lease of a house used to operate an illicit still was a subterfuge, the declaration of a co-defendant found in charge of the still in whose possession was also found a slip of paper on which the lessor's telephone number was written, the declaration of said co-defendant being to the effect that the "boss" had told him to call up the lessor in case of trouble, such admission in evidence being held improper because at the time the statement was made the declarant had already been arrested, the venture was at an end, and nothing that the declarant

could say could further its execution. In the *Brown* case, the Court held it was reversible error, in a prosecution for conspiracy, to admit in evidence against the defendants a paper found in the effects of a person deceased who was claimed to have been one of the conspirators, the paper being in his handwriting and tending to show his state of mind, but not shown to have been seen by or known to any of the defendants. It will be recalled that in the instant case there was no proof as to the source of the handwriting of the telephone numbers on the business cards seized from Pratt; there was no other proof of any kind whatsoever linking the defendant Mishkin with Pratt in any way; and it was expressly testified by the Customs officers that Mishkin had not been under surveillance between the time when he got the subway locker key from Stamp and the time when the key turned up in the possession of Pratt.

It is submitted that, the conspiracy proofs against Mishkin having been in each decisive link thereof absolutely dependent upon inadmissible evidence, there was insufficient legal proof for submission to the jury on the issue of Mishkin's guilt of conspiracy, his guilt was not proved beyond a reasonable doubt, and he was denied a fair trial on that issue.

2. It is scarcely necessary to cite authority for the proposition that it is a part of the Government's burden in a federal obscenity prosecution of the instant type to make out a jury case and to prove beyond a reasonable doubt that a defendant had knowledge of the contents of the allegedly obscene matter. E.g., *Price* v. *United States*, 165 U. S. 311 (1897); *Ackerman* v. *United States*, 293 F. 2d 449, 454 (C.A. 9 1961); *Kahm* v. *United States*, 300 F. 2d 78, 86

(C.A. 5 1962), cert. denied 82 S. Ct. 949; *Alexander* v. *United States*, 271 F. 2d 140, 145 (C.A. 8 1959). Cf. *Smith* v. *California*, 361 U. S. 147 (1959) (indicating that the scienter requirement would partake of the nature of a requirement to respect First Amendment rights).

The Government introduced no proof whatever as to the defendant Mishkin's scienter of the obscene material which Stamp brought into the United States from England. As earlier recited, the defense conceded at the trial the obscene character of the books or magazines brought in by Stamp.* However, there is no proof in this record, at least there is no legally admissible proof, direct or circumstantial, from which a jury could conclude that the defendant Mishkin knew the contents of those books or magazines, or, indeed, that he knew anything at all about whatever might be the material that Stamp had brought into the country—or, more accurately, the material which would be obtainable by the use of the subway locker key given by Stamp to the defendant. In other words, while the defense conceded that the material introduced in evidence by the Government in this case—the twelve books brought by Stamp and found in the possession of Pratt—was obscene, this imports no concession that such obscene character of this material was known to, much less conceded as having been known to, the defendant. Even if it be supposed that the defendant was expecting (*via* the alleged arrangement involving the subway locker key) to receive through the efforts of Stamp and his alleged English confederates some kind of material

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* See *infra*, where we argue, as a separate issue in this appeal, that the trial court abused its discretion in permitting the Jury to examine the books or magazines notwithstanding this concession of the defense.

which the alleged co-conspirators felt it necessary to handle in a clandestine manner, this is surely not the same as saying that the defendant Mishkin knew that he would be receiving certain specific material that would be concededly or indisputably obscene. Putting it in still another way, for all that appears in the present record, and conceding *arguendo* the entire thrust of the Government's contention as to defendant Mishkin's participation in a conspiracy with Stamp and his alleged English confederates to turn over or make available to Mishkin *some kind of allegedly* obscene matter, would it not still remain an essential part of the Government's burden of proof to show that the contents of the *specific* material which Mishkin was allegedly expecting were specifically known by him in, and beyond that, that such suppositiously specific material so suppositiously known by Mishkin was in fact obscene? Or, to spell out our thought in this regard one step further, is it not indisputable on the present record, that there being no proof that Mishkin knew specifically just what allegedly obscene material Stamp's subway locker key would yield, Mishkin would remain entitled, in any prosecution based on such alleged transaction, to contend that, for all he knew as of the time of Stamp's alleged turning over of the subway locker key to him, the allegedly obscene material involved would be of such character as to justify Mishkin in denying, or refusing to concede, its obscene character?

The Court below in its opinion apparently does not dispute that there was absolutely no proof in this record of Mishkin's actual scienter of the actual contents of the books in question. His concession, at the trial, that the books were obscene does not, of course, determine this point, as the Court's opinion apparently recognizes. The scienter

question, properly formulated on the record of this trial is: **Did Mishkin know that the books or magazines which were allegedly consigned to him from England were of such a character that their criminal obscenity would place him in peril of Federal prosecution, or such that their criminal obscenity would be conceded rather than disputed by a legally well-advised recipient?** This issue—and, we repeat, it is a First Amendment issue—does not seem to us resolvable on the basis of the reasoning in the opinion of the Court below.

3. The Trial Court's rejection of the defense request that the books or magazines found in the possession of Stamp and Pratt not be submitted for the examination of the Jury lest the case against the defendant be unnecessarily inflamed, which defense request was advanced pursuant to a concession of the obscene character of the material involved, was based upon the decision in *Parr* v. *United States*, 255 F. 2d 86 (C.A. 5 1958), and on §2591 of *Wigmore On Evidence* (3rd Edition), Vol. 9, pp. 589 *et seq.* These authorities cited by the Trial Court (63a) (see also the opinion below) are to the effect that it lies within the discretion of a trial judge whether or not to withhold from a jury proof on any issue as to which the party who would be adversely affected by such proof concedes the *factum* thereby sought to be proved. It is fair to assume, we submit, that the rule of the *Parr* case and of Wigmore's text are to be read, in a federal obscenity prosecution of the present type, in light of the cases which hold that the question of the obscene character of material in such a case is a question of fact for the jury. E.g., *Burstein* v. *United States*, 178 F. 2d 665 (C.A. 9, 1950).

After rejecting the defense request that the concededly pornographic exhibits be withheld from the Jury's inspection as aforesaid, the Trial Court then nevertheless charged the Jury as follows (77a-78a):

> "* * * The nature of the crime charged against this defendant must in no respect enter into your deliberations.
>
> It has been conceded that the material in evidence is vile, is filthy. When you look at it it is not to determine whether or not it is vile or is filthy, you have been relieved of that obligation. I have no doubt that you will agree that it is vile, obscene, lascivious, filthy, but that fact, standing by itself, without more, does not establish the guilt of the defendant. It is a piece of evidence in the case, and it must be considered along with all the other evidence in the case."

By the above instructions the Trial Court told the Jury that it was not their function to pass upon the question of the obscene character of the material. What possible reason could there have been, then, for submitting the material for the Jury's inspection, in view of said instruction, which, in turn, as seen, had been expressly based upon the defense concession of the obscene character of the exhibits? We submit that the only possible reason, or, at least, the inevitable effect, of submitting the exhibits for the Jury's inspection, was to prejudice the Jury against the defendant.

It is submitted that under the circumstances above described, and when regard is had once again to the decision in the *Manley* case discussed *supra*, to the effect that the record should be scrutinized with special care for prejudicial error where the Jury has returned inconsistent

verdicts on conspiracy and substantive counts, it was prejudicial error and an abuse of discretion for the Trial Court to submit for the Jury's inspection the pornographic exhibits whose obscene character had been conceded by the defense.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
1440 Broadway
New York, New York

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 337—October Term, 1962

(Argued April 29, 1963 Decided May 20, 1963)

Docket No. 27900

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD MISHKIN,

Defendant-Appellant.

Before:

CLARK, SMITH, and HAYS, *Circuit Judges*.

Appeal from a judgment of conviction on a jury verdict in the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge, for conspiracy to import obscene matter into the United States. 18 U. S. C. §§ 371, 1462.

Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for appellant.*

THOMAS F. SHEA, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Robert J. Geniesse, Assistant United States Attorney, New York, N. Y. on the brief) *for appellee.*

HAYS, *Circuit Judge*:

Defendant appeals from a judgment of conviction for conspiracy[1] to import obscene matter into the United States[2] entered upon the verdict of a jury. Appellant concedes that the books in question were obscene, but contests the sufficiency and propriety of the evidence of his knowing participation in the conspiracy to import them. We affirm the judgment of conviction.

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1 18 U. S. C. § 371.

The indictment also included a count charging a substantive violation of 18 U. S. C. § 1462, on which the jury returned a verdict of acquittal, and two counts charging substantive and conspiracy violations of 18 U. S. C. § 1465 which were dismissed with the Government's consent at the close of its case.

2 "Importation or transportation of obscene matters

Whoever brings into the United States * * * or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy books, pamphlet, picture, motion-film, paper, letter, writing, print, or other matter of indecent character; * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000, or imprisoned not more than ten years, or both, for each such offense thereafter."

18 U. S. C. § 1462.

The Government's principal witness was the defendant John Stamp, a waiter on the Queen Mary, who pleaded guilty prior to the trial. Stamp testified that one John Monk, a fellow waiter, introduced him to two persons in Southampton, England, who, after assurances by Monk that Stamp was "all right", asked Stamp to take some books to New York City to a person named "Eddie."[3] Monk later delivered a package to Stamp aboard the ship, and told him not to take the package directly to "Eddie" but to deposit it in a public locker in a designated subway station in New York City. Stamp was then to take the locker key to a certain book store near Times Square, to ask there for "Eddie", and to give "Eddie" the key, telling him it was "a present from the boys in England, and John would see him next trip."

Stamp opened the package when the Queen Mary docked in New York and found that it contained twelve copies of an obscene book. He was arrested at the pier when he attempted to smuggle in the package. After brief interrogation, Stamp disclosed the details of the plan and agreed to cooperate with customs officials by carrying on as he had been instructed to do but under the surveillance of customs inspectors. The following morning Stamp deposited the package in a subway locker in accordance with his instructions and then proceeded to the book store where he inquired for "Eddie". The clerk of whom he inquired shouted "Eddie" several times toward the back of the store. Appellant Mishkin appeared. Stamp said to him, "I have a key here for you, a present from the boys in

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3 Although named as defendants in the indictment, Monk and his alleged English co-conspirators have not been apprehended.

England. John Monk will see you next trip." Appellant took the key and answered "okay" or "all right". Stamp then left the store. Appellant showed no surprise at Stamp's remarks or at his handing him the key. Stamp did not tell appellant the location of the locker. There was no indication of its origin on the key itself, other than the number T184.[4]

Approximately three hours later defendant William Pratt[5] came to the locker, which was under the surveillance of customs inspectors, opened it with a key, and removed the package. Pratt was arrested shortly after leaving the subway station. A notation of appellant's unpublished home telephone number was found in Pratt's wallet at the time of his arrest, together with a note to call "Eddie or Frank" at the book store, and the telephone number of the store.

Appellant's first contention is that Stamp's testimony regarding events following his arrest was inadmissible. He cites the familiar principles that arrest terminates a conspirator's participation in a conspiracy, and that declarations of a conspirator made after the conspiracy is ended do not bind co-conspirators. See, e.g., *Krulewitch* v. *United States*, 336 U. S. 440 (1949). But these principles are wholly inapplicable to the present case. Hearsay statements made after a conspirator's arrest are inadmissible

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4 Stamp's testimony regarding the transaction at the store was corroborated by a customs inspector who observed the entire transaction while pretending to browse through books.

5 Pratt, named as a defendant in the indictment, pleaded not guilty but became a fugitive prior to the trial.

not because they were made after the arrest, but because they are hearsay to which the usual exception to the hearsay rule of statements by co-conspirators in furtherance of the conspiracy can no longer apply. *Lutwak* v. *United States*, 344 U. S. 604, 617-18 (1953). In the present case, Stamp's testimony as to the period after his arrest related solely to his own acts and to one conversation with the defendant.[6] This testimony, which was subject to cross-examination, was not hearsay, and was clearly admissible. See *United States* v. *Cohen*, 197 F. 2d 26, 29 (3d Cir. 1952).

Appellant next contends that Stamp's testimony as to the arrangements made in England was inadmissible hearsay. But, since Stamp's testimony regarding the events following his arrest sufficiently connected Mishkin to the conspiracy, the earlier declarations of his co-conspirators were admissible against him under the familiar principle that declarations made by one conspirator in furtherance of the conspiracy are admissible against all co-conspirators. See, e.g., *United States* v. *Lev*, 276 F. 2d 605, 609 (2d Cir.), cert. denied, 363 U. S. 812 (1960).

But this principle, appellant next argues, does not apply to the notations found on Pratt's person after his arrest, since the Government did not establish the time when the notations were made, and therefore did not establish that they were made in furtherance of the conspiracy. Here appellant overlooks the essential point that for the purpose for which they were admitted, *viz.*, the connection of Pratt

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6 The only exception, relating to Stamp's agreement to cooperate with the authorities, was brought out by appellant on cross-examination.

with Mishkin, the notations were not hearsay. They were admitted not to prove Mishkin's telephone number and connection with the bookstore, but as part of the proof that Pratt had received the key to the subway locker from Mishkin. See VI Wigmore, Evidence § 1788 (3d Ed. 1940).

Appellant argues that even if all the evidence was properly admitted, it was insufficient to sustain the conviction because Mishkin's knowledge of the obscene character of the books was not proved. As scienter is a necessary element of the substantive crime of importing obscene matter, 18 U. S. C. § 1462; cf. *Smith* v. *California*, 361 U. S. 147 (1959), it is also a necessary element for conviction of conspiracy to commit the substantive offense. Cf. *United States* v. *Massiah*, 307 F. 2d 62 (2d Cir. 1962). But in proving scienter, "eyewitness testimony of a bookseller's perusal of a book" is unnecessary. "The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." *Smith* v. *California*, *supra*, 361 U. S. at 154 (1959). See also *Kahm* v. *United States*, 300 F. 2d 78, 86-87 (5th Cir.), cert. denied 369 U. S. 859 (1962).

In the present case, the obscene character of the books is conceded. They were to be delivered to Mishkin by depositing them in a subway locker, and delivering the key to Mishkin. When presented with the key, Mishkin manifested no surprise, and agreed that the source of the books, John Monk, should see him "next trip." He did not ask where the locker was located, but Pratt, carrying notations relating to Mishkin, including his unlisted telephone number, nonetheless arrived at the locker and removed the

books some three hours later. From the clandestine manner in which the delivery to Mishkin was to be effected, and from Mishkin's apparent familiarity with the scheme, the jury could properly infer that he was aware of the obscene nature of the matter to be delivered. While Mishkin may not have known the exact title or contents of the books, the Government was not required to show his familiarity with every detail of the conspiracy once his knowledge of its general purpose had been shown. Cf. *United States* v. *Agueci*, 310 F. 2d 817, 825 (2d Cir. 1962).

A final point deserves mention. At the trial, the defendant "conceded" that the books were obscene and urged that by virtue of the concession, it was unnecessary and prejudicial to admit the books in evidence and to submit them to the jury. The court ruled that the books would be admitted.

The principles stated in *Parr* v. *United States*, 255 F. 2d 86, 88 (5th Cir.), cert. denied, 358 U. S. 824 (1958) amply support the ruling of the trial Judge:

> "The Government was permitted to exhibit to the jury some of the film over the appellant's objection and offer to stipulate that the film was lewd and obscene. This, the appellant says, would tend to arouse the sympathies and prejudices of the jury, so that the admission of the evidence was an error prejudicing his right to a fair and impartial trial. The admission would, to be sure, relieve the Government of its burden of proving the lewd and obscene character of the film. But it does not necessarily follow that the film should have been excluded from the view of the jury. It is a general rule that 'A

> party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.' 31 C. J. S. Evidence § 299, p. 1068. The reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' Dunning v. Maine Central Railroad Co., 91 Me. 87, 39 A. 352, 356, 64 Am. St. Rep. 208. Such rule, we think, should apply in a case such as this where the pictures offered in evidence are of the gist of the offense charged rather than descriptive or illustrative of a scene or an occurrence."

While there is some merit also in the contrary view, the question of admissibility was addressed to the sound discretion of the district court. We cannot say that that discretion was abused.

Appellant's remaining points are without merit.

Affirmed.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of May one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD MISHKIN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B—Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order on Petition for Rehearing to the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27900

UNITED STATES OF AMERICA,

Appellee,

v.

EDWARD MISHKIN,

Defendant-Appellant.

Before CLARK, SMITH, and HAYS, *Circuit Judges.*

On Petition for Rehearing or, in the alternative, for an order to stay issuance of mandate pending proceedings on petition for certiorari.

MAURICE EDELBAUM, New York City, for appellant.

PER CURIAM.

The petition for a rehearing is denied.

The petition to stay the issuance of the mandate is granted, subject to the conditions stated in Rule 28(c). The

defendant is continued on bail until disposition of the proceedings for certiorari.

C. E. C.
J. J. S.
P. R. H.
U.S.C. JJ.

June 19, 1963

APPENDIX D

Constitutional Provisions and Statutes Involved

FIRST AMENDMENT (FEDERAL CONSTITUTION)

"Congress shall make no law * * * abridging the freedom * * * of the press; * * * "

FIFTH AMENDMENT (FEDERAL CONSTITUTION)

"No person * * * shall be * * * deprived of * * * liberty * * * without due process of law".

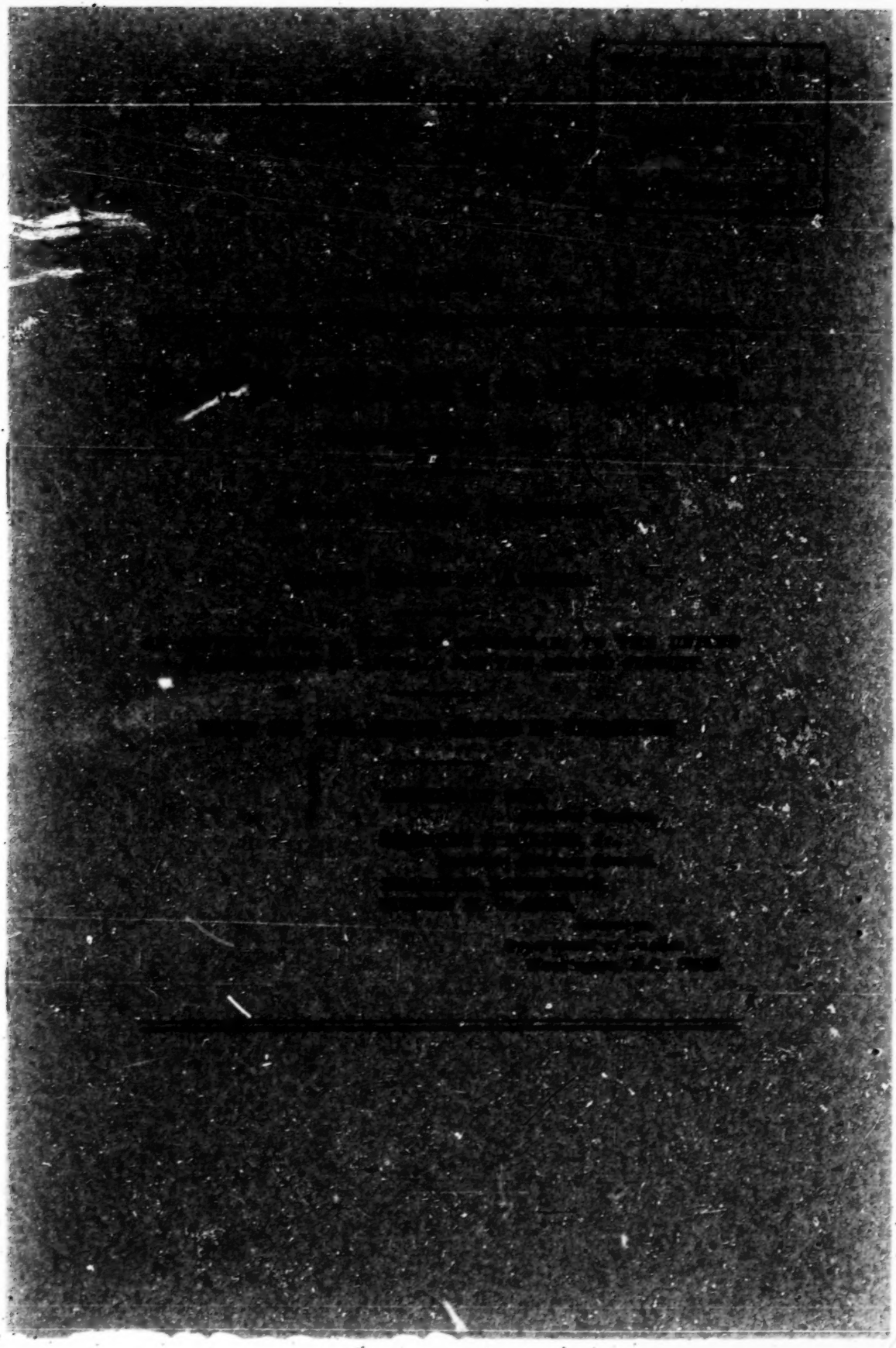
18 U.S.C. 1462, the "obscenity" statute here involved, provides in pertinent part as follows:

> "Whoever brings into the United States or any place subject to the jurisdiction thereof, or knowingly uses any express company or any common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character; or * * * "
>
> * * * * *
>
> "Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful –
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years or both, for the first such offense and shall be fined not more than $10,000, or imprisoned not more than ten years, or both, for each such offense thereafter."

Appendix D—Constitutional Provisions and Statutes Involved

18 U.S.C. 371, the conspiracy statute here involved, provides in pertinent part as follows:

> "If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> * * * * *



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 289

EDWARD MISHKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 317 F. 2d 634.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on May 20, 1963. A petition for rehearing was denied on June 19, 1963. The petition for a writ of certiorari was filed on July 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for conspiracy to violate the obscenity laws rests upon inadmissible hearsay evidence.

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2. Whether the evidence was sufficient to prove that petitioner had knowledge of the obscene character of the books involved.

3. Whether the trial court abused its discretion in permitting the jury to examine the obscene books, where the defendant had conceded that the books were in fact obscene.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate 18 U.S.C. 1462 by importing obscene books into the United States. He was sentenced to imprisonment for 5 years and placed on probation for 4½ years of his sentence (R. 8, 112).[1]

The evidence may be summarized as follows:

In August 1962, John Stamp, a waiter on the *Queen Mary*, was introduced to two persons in a Southampton, England, bookstore by John Monk, a fellow waiter. Stamp agreed to carry some books for them to "Eddie" in New York. On August 16, the day his ship sailed, Monk brought the books aboard. He directed Stamp to place the books in a locker in a New York City subway station at 42nd Street, take the locker key to a specified book store and ask for Eddie. Monk instructed Stamp to tell Eddie that the books were a present from the boys in England and that Monk would see him the next trip (R. 18–23, 32).

[1] "R". refers to the appendix filed by petitioner in the court below.

When Stamp arrived in New York on August 21, he was apprehended by customs agents as he left the boat with the books under his coat (R. 25–26, 41, 51). About 11:00 a.m., the next day, Stamp, cooperating with the agents, deposited the books in the locker at the 42nd Street subway station. Under observation of agents, he went to the Publishers Outlet book store between Eighth Avenue and 42nd Street and asked for Eddie. When petitioner appeared, Stamp said that he had a key for him from the boys in England and that Monk would see him the next trip. Petitioner replied "Okay", and accepted the key (R. 28–29, 43–45, 51–52).

About 2:45 that afternoon, William Pratt removed the books from the locker where they had been deposited. He was followed a short distance by customs agents and was then arrested (R. 47–48, 53). A search of his person revealed two business cards listing telephone numbers for petitioner's unpublished phone number in Yonkers, New York, and the telephone number of the Publishers Outlet (R. 54–57).

At the trial petitioner conceded that the books were obscene (R. 58).

ARGUMENT

I. Petitioner's objections to the admissibility of evidence used to connect him to the conspiracy to import obscene books all lack merit.

a. Testimony of Stamp and the customs agents disclosed that Stamp, after his arrest, in accordance with the illicit agreement, uttered the password and gave petitioner the key to the locker containing the books.

Since Stamp and the agents testified to these facts in court subject to cross-examination, there is no basis for petitioner's objection that the testimony was hearsay. Equally without merit is petitioner's argument that it was improper to connect him to the conspiracy by evidence of his conduct subsequent to Stamp's arrest on the theory that the conspiracy had ended. Relevant acts are admissible to prove a conspiracy even when they occur after the conspiracy has ended. *Lutwak* v. *United States*, 344 U.S. 604. The arrest of Stamp consequently did not immunize petitioner from incriminating conduct and did not bar testimony as to petitioner's subsequent acts. In any event, the withdrawal of Stamp from the conspiracy by his arrest did not terminate the conspiracy. *United States* v. *Cohen*, 197 F. 2d 26, 29 (C.A. 3). There were persons other than Stamp involved with petitioner. Hence the fact that two of the five overt acts charged occurred after the arrest of Stamp is immaterial.[2]

Petitioner himself brought out Stamp's agreement to cooperate with the agents (R. 33). But, in any event, the jury could properly infer from the testimony presented by the government that Stamp cooperated with the agents after his arrest. This fact, generally inferable in any case when an accomplice testifies as a government witness, is usually brought out by an accused to attack credibility. In this case

[2] To the extent that overt act 4 charged a conversation between Stamp and petitioner it may have been technically improper since, while petitioner was acting in furtherance of the conspiracy, Stamp was not. However, the evidence of all the other acts was uncontradicted.

the court cautioned the jury on the use of accomplice testimony (R. 87–88).

b. The business cards containing petitioner's unpublished telephone number and his business telephone number found on William Pratt after he removed the books from the locker were properly received into evidence. Pratt's possession of the locker key shortly after petitioner had obtained it linked the two together, so that the acts and declarations of Pratt in furtherance of the conspiracy would be admissible against petitioner. The fact that Pratt had the telephone numbers was admissible as proof of the conspiracy and of acts in furtherance of the conspiracy. The cards were not post-arrest declarations because they were written and given to Pratt prior to Pratt's arrest. Similarly, since the testimony of Stamp and the customs agents tied petitioner to the conspiracy, the events and conversations in Southampton were admissible into evidence as acts in furtherance of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 74.

2. The issue of whether petitioner was aware that the books were obscene was for the jury to determine. "The circumstances may warrant the inference that he [the accused] was aware of what a book contained, despite his denial". *Smith* v. *California*, 361 U.S. 147, 154. The surreptitious transfer of the books, in which petitioner participated, provided an ample circumstance from which his knowledge of their contents might be inferred.

3. Whether the jury should have been allowed to examine the obscene books after the defense conceded

their obscene character was a matter addressed to the trial judge's discretion. *Parr* v. *United States*, 255 F. 2d 86, 88 (C.A. 5), certiorari denied, 358 U.S. 824. The substitution of an admission for the exhibit might have prevented the jury from accurately appraising all the evidence in the case and understanding the reason that the books were transferred underhandedly. Especially in a case where the question of petitioner's knowledge of the obscene character of the books is a contested issue, it is clearly not an abuse of discretion for the jury to see the material involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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